

## **EXHIBIT 2**

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22 FACEBOOK, INC.

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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

REVEAL CHAT HOLDCO, LLC, a Delaware  
limited liability company, USA TECHNOLOGY  
AND MANAGEMENT SERVICES, INC. (d/b/a  
Lenddo USA), a Delaware corporation, and  
BEEHIVE BIOMETRIC, INC., a dissolved  
Delaware corporation,

Plaintiffs,

v.

FACEBOOK, INC., a Delaware corporation,

Defendant.

Case No. 5:20-cv-00363-BLF

**DEFENDANT FACEBOOK, INC.'S  
MOTION FOR ADMINISTRATIVE  
RELIEF TO CONSIDER WHETHER  
CASES SHOULD BE RELATED  
PURSUANT TO CIVIL L.R. 3-12**

Judge: Hon. Beth Labson Freeman

1 Pursuant to Civil Local Rule 3-12, defendant Facebook, Inc. respectfully moves the Court  
2 to consider whether to relate *Sherman v. Facebook, Inc.*, No. 3:20-cv-08721-LB (“*Sherman*”),  
3 *Kupcho v. Facebook, Inc.*, No. 4:20-cv-08815-JSW (“*Kupcho*”), and *Dames v. Facebook, Inc.*,  
4 No. 3:20-cv-08817-TSH (“*Dames*”) to *Reveal Chat Holdco, LLC v. Facebook, Inc.*, No. 5:20-cv-  
5 00363-BLF (“*Reveal Chat*”). The *Reveal Chat* plaintiffs agree that the cases should be related.  
6 The *Sherman* and *Dames* plaintiffs do not agree that the cases should be related. The *Kupcho*  
7 plaintiffs did not respond to Facebook’s inquiry regarding their position. A declaration from  
8 David Z. Gringer accompanies this motion.

9 Under Civil Local Rule 3-12(a), actions are related “when: (1) The actions concern  
10 substantially the same parties, property, transaction or event; and (2) It appears likely that there  
11 will be an unduly burdensome duplication of labor and expense or conflicting results if the cases  
12 are conducted before different Judges.” These putative antitrust class actions, like the recently  
13 filed *Klein* case, all follow the highly-publicized antitrust lawsuits filed by the FTC and the  
14 Attorneys General of 46 states, D.C., and Guam (collectively “the States”) against Facebook.  
15 These putative antitrust class actions all proceed under a “monopoly broth” theory of  
16 anticompetitive conduct, much like the one alleged in the *Reveal Chat* case. While the cases  
17 vary slightly in the “ingredients” they challenge (and with respect to the putative classes  
18 themselves), all focus on Facebook’s acquisitions of Instagram and WhatsApp, its purported use  
19 of Onavo for “surveillance,” and its regulation of developer usage of Facebook APIs. As the  
20 Court knows, these theories are also at the heart of the *Reveal Chat* case, which has been pending  
21 in this Court for nearly a year. It is telling that *both* Facebook and the *Reveal Chat* plaintiffs  
22 recognize that *Sherman*, *Kupcho*, and *Dames* are related to *Reveal Chat*. Similarly, both the  
23 FTC and the States acknowledge that their recently-filed lawsuits, which are predicated on some  
24 of the same conduct, are related to each of these private cases. Dispersing these largely identical  
25 actions across the dockets of multiple judges on this Court would result in a significant  
26 duplication of efforts and ultimately poses a risk of inconsistent judgments and other orders as  
27 the litigation advances. These challenges and burdens can be easily avoided by relating the  
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1 cases.

2 In light of the substantial factual and legal overlap, the threat of duplicative discovery,  
3 and the real threat of inconsistent judgments, the cases easily exceed the relevant standard for  
4 relation.

5 **First**, the cases all “concern substantially the same parties, property, transaction or  
6 event.” Civil L.R. 3-12(a)(2)(1). Facebook is the defendant in all the cases. With respect to  
7 legal theories, the cases all allege that Facebook unlawfully monopolized or attempted to  
8 monopolize markets in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. And the  
9 plaintiffs in all cases, like the plaintiffs in *Reveal Chat* (and *Klein*), all allege the following as  
10 part of their unlawful monopolization theories:

- 11 • Facebook acquired Instagram (*compare Reveal Chat* Am. Compl. ¶¶ 287-299, with  
12 *Sherman* Compl. ¶¶ 105-108, *Kupcho* Compl. ¶¶ 171-179, and *Dames* Compl. ¶¶ 59-63;  
13 *see also* ECF No. 85-2 (“*Klein* Compl.”) ¶¶ 170-177), and WhatsApp (*compare Reveal*  
14 *Chat* Am. Compl. ¶¶ 323-332, with *Sherman* Compl. ¶¶ 110-111, *Kupcho* Compl. ¶¶ 186-  
15 188, and *Dames* Compl. ¶¶ 65-68; *see also Klein* Compl. ¶¶ 184-186), allegedly to  
16 eliminate potential competition;
- 17 • Facebook allegedly imposed conditions on or restricted access to its Platform for third-  
18 party developers, including through withdrawal of access to APIs (*compare Reveal Chat*  
19 *Am. Compl. ¶¶ 247-261, with Sherman* Compl. ¶¶ 112, 114, *Kupcho* Compl. ¶¶ 165-167,  
20 169, and *Dames* Compl. ¶¶ 74-81; *see also Klein* Compl. ¶¶ 164-166, 168); and
- 21 • Facebook allegedly acquired and used Onavo to collect user data and employed that data  
22 to identify and target competitive threats (*compare Reveal Chat* Am. Compl. ¶¶ 266-286,  
23 with *Sherman* Compl. ¶¶ 112-114, *Kupcho* Compl. ¶¶ 149-154, and *Dames* Compl. ¶¶  
24 55-56; *see also Klein* Compl. ¶¶ 148-153).

25 Recognizing these similarities, both the FTC and the States listed *Reveal Chat*, *Sherman*, and  
26 *Kupcho* as related to cases they respectively filed on December 9, 2020 in the United States  
27 District Court for the District of Columbia challenging Facebook’s acquisitions of WhatsApp  
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1 and Instagram and its platform policies. The FTC stated that *Reveal Chat*, *Sherman*, and *Kupcho*  
2 “involve[] common issues of fact” and “grow[] out of the same event or transaction” as the  
3 FTC’s case. ECF Nos. 5, 10, 28, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590-CRC (D.D.C.). The  
4 States similarly told the court that *Reveal Chat* and *Sherman* “involve[] common issues of fact,”  
5 and that *Kupcho* both “involves common issues of fact” and “grows out of the same event or  
6 transaction.” ECF Nos. 6, 9, 14, *State of N.Y. v. Facebook, Inc.*, No. 1:20-cv-03589-JEB  
7 (D.D.C.).<sup>1</sup> Indeed, the timing of the complaints makes it clear that these lawsuits were filed  
8 either in anticipation of or in the wake of the FTC’s and the States’ lawsuits.

9 To be sure, the plaintiffs in the various cases do differ somewhat. However, “Rule 3-  
10 12(a)(1) allows for relation of actions even where plaintiff classes differ, including classes of  
11 consumers as opposed to content creators.” *Pepper v. Apple Inc.*, 2019 WL 4783951, at \*1  
12 (N.D. Cal. Aug. 22, 2019). In *Pepper*, Judge Gonzalez Rogers correctly held that the fact that  
13 the plaintiffs in certain of the related cases were “app developers” while others were  
14 “consumers” did not defeat relation because the “bases of plaintiffs’ complaints[] center around  
15 the same technology and economic structure[].” *Id.* So it is here. The plaintiffs all challenge  
16 Facebook’s supposed dominance over social networking (however denominated), the  
17 competitive structure in that market, and the impact of similar or identical conduct on  
18 competition in that industry.

19 Nor is relation defeated by the fact that the *Sherman*, *Kupcho*, and *Dames* complaints,  
20 like the complaint in *Klein*, allege as one component of their monopoly broth theory that  
21 Facebook deceived users about its data privacy practices, while that theory is currently absent  
22 from the *Reveal Chat* complaint. Compare *Klein* Compl. ¶¶ 91-125, with *Sherman* Compl. ¶¶

23 \_\_\_\_\_  
24 <sup>1</sup> The FTC and the States also listed *Klein* as a related case. The FTC indicated that *Klein* both  
25 “involves common issues of fact” and “grows out of the same event or transaction.” ECF No. 4,  
26 *FTC v. Facebook, Inc.*, No. 1:20-cv-03590-CRC (D.D.C.). The States also indicated that *Klein*  
27 “involves common issues of fact.” ECF No. 5, *State of N.Y. v. Facebook, Inc.*, No. 1:20-cv-  
28 03589-JEB (D.D.C.).

1 92-100, *Kupcho* Compl. ¶¶ 93-101, and *Dames* Compl. ¶¶ 83-93. Relation does not require  
2 identical theories of liability. *See, e.g., Pepper*, 2019 WL 4783951, at \*2. Were it otherwise,  
3 parties who wished to defeat relation could do so easily through creative pleading or strategic  
4 timing of amendments.

5 **Second**, given the substantial factual and legal overlap between the cases, it is “likely  
6 that there will be an unduly burdensome duplication of labor and expense ... if the cases are  
7 conducted before different Judges.” Civil L.R. 3-12(a)(2). Because all of these cases involve the  
8 same activity and substantially the same legal theories, any discovery, motion practice, trials, and  
9 potential remedies will substantially overlap. At the center of all of these cases will be an  
10 examination of the relevant markets in which Facebook operated, Facebook’s conduct in the  
11 relevant markets, including the competitive effects of the challenged acquisitions, the viability of  
12 app developers as emergent competitors to Facebook, how, if at all, Facebook used data from  
13 Onavo, and Facebook’s API practices. Substantial efficiencies will be available in discovery  
14 into each of these theories if these cases are related. Likewise, it would be inefficient and unduly  
15 burdensome to “hav[e] ... different judges govern discovery disputes.” *Financial Fusion, Inc. v.*  
16 *Ablaise Ltd.*, 2006 WL 3734292, at \*3 (N.D. Cal. Dec. 18, 2006). Moreover, given the time and  
17 effort that the Court has already expended in assessing similar legal claims premised on a shared  
18 factual predicate, relating *Reveal Chat*, *Sherman*, *Kupcho*, and *Dames* would conserve judicial  
19 resources. Discovery in *Reveal Chat* has not yet begun, meaning that it is not far ahead of  
20 *Sherman*, *Kupcho*, or *Dames*. *Id.* at \*4 (noting lack of delay as factor in favor of relation).

21 **Third**, absent relation, there is a serious risk “of conflicting results.” *See* Civil L.R. 3-  
22 12(a). Facebook anticipates raising similar defenses to the *Sherman*, *Kupcho*, and *Dames*  
23 allegations as it has raised in *Reveal Chat*, including that the claims are untimely and that the  
24 plaintiffs have failed to plausibly allege exclusionary conduct. If the cases are not related and  
25 related to *Reveal Chat*, there is the real prospect, for example, that different courts could reach  
26 different conclusions about whether fraudulent concealment theories can ever be resolved on  
27 motions to dismiss, whether Facebook owed any duty to any of the plaintiffs to disclose its plan  
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1 for the API withdrawal, or findings regarding whether Facebook’s intent was sufficient to  
2 support a fraudulent concealment claim. And while *Sherman*, *Kupcho*, and *Dames* allege the  
3 existence of different relevant markets with different market participants than *Reveal Chat*, the  
4 allegations all focus on the same *product*: the Facebook platform. *Reveal Chat* Am. Compl. ¶¶  
5 130-142, *Sherman* Compl. ¶¶ 23-24, *Kupcho* Compl. ¶¶ 38-52, *Dames* Compl. ¶¶ 22-25; *see also*  
6 *Klein* Compl. ¶¶ 37-51. Treating the same product as part of different alleged relevant markets  
7 increases the prospect for inconsistent judgments as to Facebook’s purported monopoly power  
8 and the markets in which Facebook is alleged to participate. If decisions on these pivotal issues  
9 are inconsistent, not only would it lead to disarray among the various private and government  
10 cases, but also potentially disrupt the operations of the dynamic markets in which Facebook  
11 competes today.

12 Because of the substantial overlap between these cases, and because the Court  
13 is already familiar with many of the legal and factual issues implicated in the cases, Facebook  
14 respectfully requests that the Court enter an order relating *Reveal Chat*, *Sherman*, *Kupcho*, and  
15 *Dames*.

1 Dated: December 16, 2020

Respectfully submitted,

2  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of December 2020, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System. And I hereby certify that I have served the foregoing document on counsel for the plaintiffs in the action in which relation is sought pursuant to agreement between the parties.

/s/ Sonal N. Mehta  
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